No. 15,183

In the

United States Court of Appeals

For the Ninth Circuit

HERBERT CAMPOS,
Plaintiff and Appellant,

v.

CARL E. OLSON, also known as CARL "BOBO" OLSON; SID E. FLAHERTY; SID FLAHERTY PROMOTIONAL ENTERPRISES, a corporation, et al.,
Defendants and Appellees.

Opening Brief of Appellant, Herbert Campos

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Campos, Herbert	*Plaintiff.*
Flaherty, Sid E	*Defendant, Boxing Manager.*
Leavitt, Leo	*Hawaiian Boxing Promoter.*
Lipton, Maurice (Moe)	*Olson's Manager 1946-47.*
Miles, Thomas B. (Tommie)	*Former Secretary of Territorial Boxing Commission, Advisor to Olson.*
Miller, Charles W	*Olson's Manager 1947-48.*
Olson, Carl E. (Bobo)	*Defendant, Professional Boxer, Former World's Middleweight Champion.*
Spagnola, James A	*Bowling Alley Manager, Licensed Boxing Manager, Olson's "Agent" at the June 19, 1951 Commission meeting.*
Wright, Haywood (Sharkey)	*Olson's Trainer.*

*For convenience referred to in the brief by surnames only.

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JURISDICTION

This is an appeal from a final judgment of the District Court for the Northern District of California, Southern Division, entered May 7, 1956 (R. 55-56).[1] Notice of appeal was filed May 28, 1956 (R. 57).

The jurisdiction of the District Court was invoked under 28 U.S.C.A., Sec. 1332. The plaintiff Herbert Campos is, and at all times herein material was, a resident and a citizen of the Territory of Hawaii (R. 29). The defendants, Carl E.

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1. References to page numbers in Transcript of Record are shown by the page number following R. in parentheses.

Olson and Sid E. Flaherty, are and at all times herein material were citizens and residents of the State of California (R. 49).

The amount of the controversy exceeds $3,000.00, exclusive of interest and costs (R. 49).

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1291 and 1294(1).

STATEMENT OF THE CASE

In this action plaintiff seeks damages against the defendant Olson for the breach of two written contracts and against defendants Flaherty and Sid Flaherty Promotional Enterprises for the tort inducing the breach of contract.

THE FIRST PHASE OF OLSON'S CONTRACTUAL RELATIONSHIPS 1945—April, 1948

In September, 1945 Olson and Lipton signed a fourteen year contract by which Lipton was to act as Olson's manager for 50% of the net purses from boxing matches Olson might engage in (Exhibit 1, R. 59). Olson was 17 years old at this time (R. 345). This contract was later approved by the Superior Court in San Francisco. In January, 1946 Lipton delegated his managerial rights under this contract to Flaherty retaining two-thirds of the 50% for himself (Exhibit 36, R. 408-410).

After seven preliminary bouts under the management of Flaherty, Olson was barred from fighting further in California until he should become eighteen. Olson thereupon returned to Hawaii in February, 1946 (R. 345, 346).

After Olson's eighteenth birthday and being still in Hawaii, he was turned over by Lipton to a promoter named Leavitt (R. 346).

Still in Hawaii and being dissatisfied with the share of the purses he was receiving from Leavitt, Olson signed a con-

tract on February 3, 1947 with Miller as his manager (R. 60).

Olson left Miller after a boxing match in Manila on April 7, 1948 and returned to Hawaii (R. 146).

THE SECOND PHASE
May, 1948—July 20, 1949

In the latter part of May, 1948 Olson requested Campos to manage him (R. 87, 88). Campos consented and made arrangements for Wright to continue as Olson's trainer. Campos agreed to pay Wright one-third of his manager's share (R. 89, 90).

On July 11, 1948, Olson disaffirmed his contract with Miller pursuant to Hawaiian law upon reaching the age of twenty years.[2]

Campos and Olson then on July 14, 1948 entered into a "commission form" of managerial agreement for a term of five years (Exhibit 2, R. 61). This agreement provided for a manager's share of one-third of net proceeds and met all requirements of the Territorial Boxing Commission and was approved by it on July 19, 1948 (R. 17). It is one of the contracts upon which this suit is based.

On the same date this five year contract was signed, Campos and Olson also entered into a second contract which they termed a "world wide" contract (Exhibit 4, R. 62). Under both of these agreements Olson agreed to perform exclusively under the management of Campos (R. 18).

In November, 1949, after approximately a year and a half under Campos' management, Olson was ranked for the first time as a contender for the middleweight championship of the world, viz, eighth (R. 105).

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2. Olson was born July 11, 1928 (R. 82).

THIRD PHASE

July 20, 1949—October 26, 1950

On July 20, 1949 Campos and Olson signed a further "world wide" contract for the term of ten years (Exhibit 8, R. 99). This agreement is the other contract for the breach of which damages are sought in the present case. It was recorded in the City and County of Honolulu and filed with the Territorial Boxing Commission (R. 68-69). After two matches in Honolulu in July and August following this further contract, Olson was scheduled to box Johnny Duke on October 4, 1949 in Hawaii (R. 100).

A few days before September 26, 1949, without Campos' knowledge (R. 100), Olson presented himself to Flaherty in San Francisco. Flaherty, although knowing that Olson was under contract with Campos (R. 320), immediately signed Olson to a contract whereby Flaherty was to act as Olson's exclusive manager for a period of seven years from September 26, 1949 (Exhibit 9, R. 69-70). This contract was filed with the California State Athletic Commission and is the agreement under which Flaherty and Olson were still operating at the time of the trial in December, 1955 (R. 321) although no fights were had under it until Olson's final breach with Campos in June, 1951 which gives rise to the present case (R. 237).

Upon learning of Olson's infidelity in September, 1949 Campos notified the Territorial Boxing Commission and on the date set for the Duke fight, Olson was suspended by the commission for failing to appear (R. 101). Campos arranged for Spagnola to come to San Francisco to persuade Olson to leave Flaherty and carry out the Campos contracts. Spagnola was successful and pursuant to Campos' instructions Olson and he went to New York to arrange for bouts for Olson there (R. 237). Olson's default in the Duke fight and resulting nationwide suspension necessitated their

return to Hawaii without being able to take advantage of opportunities in New York (R. 101-102). Meanwhile Campos was attempting to have the suspension set aside. The Territorial Boxing Commission finally lifted the suspension when Olson met Duke in Honolulu on November 22, 1949 (R. 103, 237-238).

Thirteen months after obtaining the September, 1949 contract, Flaherty, on October 23, 1950, for himself and as attorney in fact for Lipton, released all managerial rights to Olson under the September 18, 1945 Lipton contract and his own September 26, 1949 contract with Olson (Exhibits 10A, 10B; R. 71).

Meanwhile under Campos' management Olson had steadily improved in professional ability. In March, 1950 he met the British Empire middleweight champion Dave Sands, who was also the fourth ranking middleweight in the world (R. 106). And on October 26, 1950 in Philadelphia Olson met champion Sugar Ray Robinson for the first time, losing in the twelfth round (R. 106).

FOURTH PHASE
January, 1951—July 9, 1951

Following the Sugar Ray Robinson fight on October 26, 1950 Olson rested until the first of the year (R. 109, 155). On January 19, 1951 he and Campos entered into an agreement with the promoter Leavitt for six main event matches to be held in Honolulu not more than forty days apart, Olson to box no other opponents during the period of this agreement (R. 71, 109; Exhibit 11). Leavitt failed to produce with the result that Campos and Olson were prevented from obtaining any other matches until the expiration of the first forty day period (R. 110). Clearance was not obtained from the commission until about March 12th (R. 200, Exhibit 34). It will be remembered that this was the

same Leavitt who had been involved with Lipton and Flaherty in the management of Olson back in 1946 and early 1947 (R. 315, 346). The result was that Campos' hands were tied in getting further bouts for Olson until early March.

Meanwhile in February, 1951, faced with this inactivity, Olson commenced talking to Miles about again going back to Flaherty (R. 239). Miles was a former secretary of the Territorial Boxing Commission and a close friend of Flaherty (R. 314-318) and at this time he began advancing money to Olson (R. 239-240).

After waiting out the expiration of the Leavitt agreement, Campos obtained two bouts for Olson in Honolulu, one on March 20th and the other with Lloyd Marshall on May 7th (R. 116, Exhibit 5) and he then arranged for Olson to meet Chuck Hunter in Honolulu on June 19th, this match being approved by the Territorial Boxing Commission on May 28th (R. 75).

Shortly after the Marshall fight on May 7th Olson contacted Flaherty directly about fighting on the mainland (R. 242) and Flaherty replied that "* * * he had a contract on me (Olson), a California contract, that I had signed, *and that was a good contract*" (R. 244, insertion and emphasis ours). This was the contract of September 26, 1949 which Flaherty had obtained with knowledge that Olson was already signed with Campos (R. 320).

Some time in May, 1951 Olson offered Campos $6,000.00 for his contracts but Campos refused to sell at that price (R. 407-408). Also early in May, 1951 Campos refused an offer of $3,000.00 from Spagnola (R. 353).

Olson's determination to finally quit Campos at this time appears clearly from other evidence in the record. He told Campos he was going to leave for the mainland after the Hunter fight (R. 249).[3] He also told Miles he was "leaving

3. Scheduled for June 19, 1951 (R. 116).

Mr. Campos to go to Mr. Flaherty" (R. 251). He had written Flaherty early in May and received the reply about Flaherty having "a good contract" on him (R. 244). And so that there would be no doubt whatever concerning his repudiation of all further obligation to Campos, Olson delivered a letter to that effect dated June 13, 1951 to the Territorial Boxing Commission which was received by the commission on June 14, 1951 (R. 244-248, Exhibit 35).

The Hunter match had meanwhile been postponed to July 3d (R. 75) and after upbraiding the promoter, Lau Ah Chew, for the postponement, Olson or his scrivener says:

> "My Territorial manager *knew that I was scheduled to leave for the mainland to fulfill an engagement with my legal mainland manager, Sid Flaherty, immediately after the bout with Hunter on June 19th.* My Territorial manager was aware that rescheduling the Hunter bout would work an undue hardship on me *to meet commitments on the mainland.*
>
> "In view of the foregoing I maintain that my Territorial manager did not act in good faith in my behalf and I ask that the Commission investigate his actions.
>
> "It is my full intention to carry out the full obligation of the Hunter contract as may be determined through the judicious and unprejudiced action of the Territorial Boxing Commission. However, I hereby state of my own free will *that I will not be available for further matches in the Territory until further notice by myself.*
>
> Sincerely yours,
> Carl Bobo Olson."
>
> (R. 247-248, emphasis ours.)

At the trial Olson admitted that someone else prepared this letter for him but doesn't remember who it was. He *doesn't remember* whether or not it was Miles. In any event he read it over and signed it and personally delivered it to the commission office (R. 244-245).

The letter of June 13th is clearly a binding admission by Olson that he had flatly repudiated his agreements with Campos (IV Wigmore on Evidence, 3d Ed. 19). In it Olson (1) admits that he is leaving for the mainland to fight under Flaherty; (2) admits that Campos knew of his repudiation, and (3) unequivocally announces to the Territorial Boxing Commission that he will no longer respect his agreements with Campos, at least so far as boxing in Hawaii is concerned—"I will not be available for further matches in the Territory until further notice by myself."

Thus Olson's position as communicated to Campos (see R. 249) was in direct violation of the agreements. In the July 14, 1948 five year contract, approved by the territorial commission (Exhibit 2, R. 61, 17-21), Olson had agreed "to render services solely and exclusively" for Campos whenever required by Campos "in the Territory of Hawaii and elsewhere the Manager may from time to time direct" (Id., Sec. 1); and he had also agreed

> "* * * that he will not during the continuance of this contract take part in any boxing contests or other exhibitions, perform or otherwise exercise his talent in any manner or place *except as directed by the Manager* (Campos) * * *" (Id., Sec. 5, emphasis and insertion ours.)

And in the ten year contract of July 20, 1949 Olson had also expressly agreed with Campos as follows:

> "The Party of the Second Part (Olson) hereby binds himself and promises and agrees that he shall, and will not during the term of this Agreement, take part in any boxing contest, athletic contest, or act, perform, or otherwise exploit or exercise his talents in any manner, shape or form whatsoever, or in any place, wheresoever, *except as directed by said Party of the First Part* (Campos)." (Exhibit 8, Sec. 7, R. 24, insertions and emphasis ours.)

We come now to the meeting of the Territorial Boxing Commission held on June 19, 1951.

On Tuesday, June 19th the commission met to discuss the cancellation of the Hunter-Olson match (R. 117).[4] It approved the "request of promoter Lau Ah Chew to cancel the July 3d show (Carl Olson versus Chuck Hunter)" (Exhibit 18). Immediately after the formal meeting there was an executive session at which Campos, Olson, Miles, Spagnola and Wright were present in addition to the personnel of the commission (R. 118).[5] Olson told the commission that "he wanted to come up to the mainland to fight under Sid Flaherty" because of lack of fights in Honolulu (R. 119) and according to certain witnesses Campos thereupon simply said he could go (see R. 352, 369, 379, 392, 400, 404).

We submit that the reply attributed to Campos by these witnesses cannot fairly be viewed in isolation. There is other uncontradicted objective evidence which must be considered in arriving at what was really said, namely, the prior refusals by Campos of cash offers for the contracts and the documentary evidence concerning his subsequent efforts to protect his rights (Exhibits 19, 20, 21, 22, 23, 33). Thus Campos' testimony is as follows:

> "Olson stated that he wanted to come up to the mainland to fight under Sid Flaherty, and that I couldn't get any fights and he wanted to come up and fight under Sid Flaherty. And I stated—I told the commission I

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4. The discussion of this matter was initially set for June 18, 1951, but was put over until the 19th to enable all interested parties to be brought in (R. 367-368).

5. On deposition prior to the trial Miles flatly denied having been present at this executive session. This was in response to questions *by defendants' counsel* in an obvious effort to eliminate Miles and therefore Flaherty from any connection with Olson's decision to leave Campos (R. 380-381). At the trial, however, Miles reversed his position and gave a detailed account of the meeting (R. 377-379).

had contacted Sid Flaherty in May and that Sid Flaherty answered that he couldn't get any fights with anyone to manage the boy, training the boy, and I also stated that I would not stand in the way Olson making a living in the fight game and that [t]he could go to the mainland *provided that I had my contract rights, and also I would get Olson a trainer on the mainland.*" (R. 119, emphasis and correction ours.)

Campos is squarely corroborated by Commissioner Stagbar:

"Q. All right. Was anything said at this last meeting about 'Bobo' going to the mainland?

A. There was.

Q. Please tell us what was said about that.

A. As I recall—I don't know who first brought it up—Olson or Campos—but I do recall this specifically, that Campos said he had no objection to 'Bobo' going to the mainland, that everybody is entitled to make a living, and he would permit him to go to the mainland *but that he still would retain his managerial rights.*

Q. You remember him saying that?

A. I do.

Q. Do you remember anything being said about Campos furnishing a trainer on the mainland?

A. That appears vague in my mind. There was a trainer mentioned some way or other but I can't pin it right down as to saying Campos had proposed it or whether someone had asked him and he said he would want it. *But there was a trainer mentioned during the course of the meeting.*" (R. 214-215, emphasis ours; see also R. 222-223).

Also Commissioner Sterling testified that Campos said he would get Olson "a trainer up there" (R. 277).

The foregoing testimony of Campos, Stagbar and Sterling is controverted only by the inference which may arise from

other witnesses failing to remember or to testify to the condition stated by Campos, and in the case of the witness Spagnola by the statement that "nothing else was said" except that Olson could go (R. 352).

Furthermore it is uncontradicted that the Territorial Boxing Commission took no action whatever with regard to any modification or cancellation of the contracts themselves (R. 277, 304, 402).

Olson promptly left Honolulu for San Francisco the morning following the June 19th meeting (R. 404). Meanwhile Miles had reported to Flaherty as the result of which Flaherty arranged with Miles to pay Olson's transportation (R. 319, 314).[6] Upon his arrival in San Francisco Olson "went right up to see Mr. Flaherty" (R. 252).

On July 9, 1951 Olson boxed Hunter in San Francisco. This was under Flaherty's auspices where he has subsequently remained.

CAMPOS' EFFORTS TO PROTECT HIS RIGHTS

A "couple of days" after June 19, 1951 Campos learned from the newspaper that Olson had left and "was on the mainland already" (R. 120). He immediately wrote the Territorial Boxing Commission reaffirming his position at the June 19th meeting and asking its assistance in enforcing his contracts with Olson.

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6. Miles received his reward later. On June 15, 1954 Olson made his first professional appearance in Hawaii after leaving Campos in a bout with a fighter named Jesse Turner (R. 253). This match was promoted by Boxing Enterprises, Ltd. (R. 333, Exhibit 37) and Flaherty and Olson waived their share of the purse in favor of the promoter (R. 344). Miles participated in the promotion of this fight and in the profits realized therefrom (R. 332, 344).

"6/27/51

Territorial Boxing Commission
Honolulu, T. H.
Gentlemen:

"It is my understanding that Carl 'Bobo' Olson has left the Territory to fight on the Mainland.

"As manager of Boxer Olson, I respectfully ask your assistance, as he left without my knowledge, and consent. *It is not my desire to prevent Olson from fighting on the Mainland but am most anxious to get my share of his purse.*

"Would you be kind enough to notify the National Boxing Ass'n of these facts.

"You and the National Boxing Ass'n are fully aware of the contracts which I have with Olson, one filed with your commission and another which is recorded with the Bureau of Conveyances at Honolulu.

"I would appreciate any help you can give me in this matter.

Very truly Yours
Herbert Campos"
(Exhibit 19, R. 78, emphasis ours.)

This letter conforms with the offer Campos made at the meeting and further corroborates his testimony. Within the terms of Campos' offer, his reference to "my share of his purse" clearly means the manager's share remaining after the cost of arranging for a mainland representative.

On July 6, 1951, Campos wired the California State Athletic Commission at San Francisco informing them that he was recognized as Olson's "legal manager" by the National Boxing Association and the Territorial Boxing Commission and asking that the California commission withhold his share of Olson's purse and also stating that action would be taken for Olson's suspension (Exhibit 21, R. 81).

On July 9th, pursuant to instructions of the territorial commission, Secretary Lee replied to the letter of June 27th:

"Dear Mr. Campos:

"In reply to your letter of June 27th the Territorial Boxing Commission wishes to state that it has no jurisdiction in the matter of collecting your manager's share of Carl Olson's purse while he is away on the Mainland. The Commission feels that the best procedure to follow would be to write to the California State Athletic Commission, informing them of your rights as Olson's manager and send them copies of your contracts with Olson, advising them that these contracts have been recogized by the National Boxing Association.

"You can request them to withhold one-third of Olson's purse for you, or you may have an injunction filed with the California Commission.

Yours very truly,
Robert M. Lee,
Acting Boxing Commissioner."

(Exhibit 20; R. 80; see also Exhibit 33.)

On October 8, 1951 Campos presented a further letter to the Territorial Boxing Commission requesting Olson's suspension and stating

"I believe I am recognized as his legal manager by the Territorial Boxing Commission and the N.B.A." (Exhibit 22, R. 82)

The Territorial commission's reply to this letter, which is set forth in its minutes of October 8, 1951 (Exhibit 23, R. 83) was that the commission could not suspend Olson inasmuch as Campos had given his permission "to Olson to box on the Mainland" but that "The matter of collecting his manager's share of Olson's purses was a civil one and should be taken up in civil court" (R. 83).

On September 11, 1953 Campos filed suit for damages for breach of contract in the Superior Court in San Francisco (Exhibit 25, R. 83-85). The present action was filed on June 10, 1955 (R. 29).

SPECIFICATION OF ERRORS RELIED UPON

Appellant's statement of points on which he intends to rely on this appeal is set forth at pages 414-417 of the record. In summary the thirteen points are:

1. The trial court erred in holding there was no breach of contract by Olson.

2. The court erred in holding that Olson did not anticipatorily repudiate the contracts.

3. The court erred in holding Campos waived or abandoned his contractual rights under the contracts.

4. The court erred in holding Flaherty or Sid Flaherty Promotional Enterprises, Inc. did not cause or induce the breach of the contracts by Olson.

ARGUMENT

Summary of Argument.

We intend to show:

1. The conduct of Olson prior to June 19, 1951 was so repugnant to his contracts with Campos as to amount to a breach of contract, actually and anticipatorily.

2. There was no mutual rescission of the contracts by Campos and Olson on June 19, 1951.

3. Olson's breach of the contracts was wrongfully caused and induced by the other defendants.

I.

THE CONDUCT OF OLSON PRIOR TO JUNE 19, 1951 WAS SO REPUGNANT TO HIS CONTRACTS WITH CAMPOS AS TO AMOUNT TO A BREACH OF CONTRACT, ACTUALLY AND ANTICIPATORILY.

An anticipatory breach or repudiation of contract takes place when the promisor either makes a positive statement to the promisee that he will not perform his contractual duties or does any voluntary affirmative act which renders substantial performance impossible or apparently impossible (Restatement of Contracts Sec. 318). The doctrine of anticipatory repudiation has been adopted both in the federal courts and in the courts of almost all the states where the question has been raised (5 Williston on Contracts, (rev. ed., 3711)). The doctrine is firmly established in California (*Caminetti v. Pacific Mutual Life Insurance Company* (1943), 23 C.2d 94, 104). All that is necessary is a positive statement by one party to the contract that he does not intend to perform the terms of an existing contract. In *Gold Mining and Water Co. v. Swinerton* (1943), 23 C.2d 19 at page 29 the Supreme Court of California said:

> "A contract is totally breached and an anticipatory repudiation occurs when the promisor without justification and before he has committed a breach, makes a positive statement to the promisee indicating that *he will not* or cannot substantially perform his contractual duties. (*Cobb v. Pacific Mutual Life Ins. Co.,* 4 Cal. 2d 565 [51 P.2d 84]; Restatement, Contracts, Secs. 316, 317, 318)." (*id.,* p, 29, emphasis ours.)

In the cited case which involved an action for damages for breach of a mining lease in failing to develop the property and make certain improvements the lessees had stated in a conversation with a representative of the lessor that unless the lessor would consent to an assignment of the lease they,

the lessees, "would have nothing further to do with the contract" and that they were "through with it and would not go on and do anything further in it whatsoever" (*id.*, p. 27). The lessor refused to consent to the assignment and these statements were held to constitute "a true anticipatory breach" on the part of the lessees thus entitling the lessor to bring suit prior to the time fixed for performance and to recover prospective damages. In this respect the court further said:

> "From the foregoing discussion it further follows that even if defendants' interpretation of the clause with reference to their time to perform under the lease is accepted we still would have a true anticipatory breach on defendants' part by reason of their repudiation of the lease which would entitle plaintiff to recover prospective damages." (*id.*, p. 30).

Olson's letter of June 13th stated Campos knew Olson was leaving and Olson testified that *he had told Campos the same thing prior to the letter* (R. 249). Olson by this letter discloses that he had "a legal mainland manager" and "commitments on the mainland". Any doubts that might have remained are dispatched by the final sentence: "However, I hereby state of my own free will that I will not be available for further matches in the Territory until further notice" (R. 247-248).

This constituted a total anticipatory breach of the unexecuted portion of the contracts which Campos was entitled to accept. Olson, of course, *did* come to San Francisco and did place himself under the exclusive management of Flaherty.

In *Crown Products Company v. California Foods Products Corp.* (1947), 77 C.A. 2d 543, the sellers under a three year contract for the sale of vinegar at a specific price

refused during the performance of the contract to make any further deliveries unless the buyer agreed to an increase in the price. The final statement by the seller upon the buyer's refusal to pay the increase was "very well, then, we are all through, I won't make any further deliveries." (*id.*, p. 547). The buyer immediately brought suit for damages for breach of the contract. Thereafter, the seller tendered delivery at the contract price which the buyer refused on the ground that the seller "had previously refused to carry out the terms of your contract with us" (*id.*, p. 547). On appeal the defendant seller contended that there was no evidence to support the finding that it had breached the contract inasmuch as it had tendered delivery at the contract price after the filing of the action which the plaintiff buyer had refused to accept. However, the appellate court held that the statements of the seller to the effect that it would not perform the contract constituted an anticipatory breach upon which the buyer was entitled to elect to bring suit and recover his prospective damage. In this respect the court said:

> "The evidence heretofore set forth clearly refutes this contention. The testimony of plaintiff's attorney shows without ambiguity that defendant refused to perform and repudiated the contract unless an increase was granted. This repudiation, whether regarded as a present breach of an existing obligation to perform *or as an anticipatory breach of an obligation which defendant had several months in which to complete performance,* could not be retracted by the tender of 2,700 gallons made after suit was brought. *It is well settled law that in cases of anticipatory breach the bringing of suit is a sufficient election to treat the repudiation as a breach and to prevent its retraction* (5 Williston on Contracts (rev. ed.), p. 3723, sec. 1323; Restatement of Contracts, secs. 318, 319)." (*id.*, p. 551, emphasis ours.)

So in the present case Campos is entitled to treat Olson's repudiation as manifested in his statements to Campos and in his June 13th letter as a breach of the contracts and recover prospective damages.

The basis for the rule of "anticipatory breach" is stated as follows in the case of *Hawkinson v. Johnston* (1941, 8 Cir.), 122 F.2d 724 which involved the abandonment and attempted surrender of leased property by the lessees during the term of the lease:

> "The rationale underlying the rule as declared in Hochster v. De La Tour, supra, certainly is as fairly applicable to contracts of lease as to other general contracts: 'The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer.'
>
> "The real sanctity of any contract rests only in the mutual willingness of the parties to perform. Where this willingness ceases to exist, any attempt to prolong or preserve the status between them will usually be unsatisfactory and mechanical. Generally speaking, it is far better in such a situation, for the individuals and for society, that the rights and obligations between them should be promptly and definitely settled, if the injured party so desires, unless there is some provision in the contract that, as a matter of mutual intention, can be said to prevent this from being done. The commercial world has long since learned the desirability of fixing its liabilities and losses as quickly as possible, and the law similarly needs to remind itself that, to be

useful, it too must seek to be practical." (*id.*, p. 729-730)

In this view of the matter Campos' statements at the meeting of June 19, 1951 or at any other time subsequent to Olson's repudiation of the contracts are of no consequence whatever. Assuming that Campos gratuitously told Olson without qualification that he "could go and fight on the mainland", nevertheless such a statement would be entirely consistent with an acceptance by Campos of Olson's prior repudiation of the contracts as already shown. There was no consideration whatever for any suggested relinquishment of Campos' right of action for Olson's breach.

There is no dispute in this case as to the events that took place prior to the June 19, 1951 meeting—Olson's letter, statements and actions. The dispute is over the conclusions to be drawn therefrom. Rule 52(a) *Federal Rules Civil Procedure,* 28 U.S.C.A., is not applicable to the situation as it existed prior to this meeting (*Plomb Tool Co. v. Sanger* (1951, 9 Cir.), 193 F.2d 260, 264). This court is free to make its own determination as to the legal conclusion to be drawn (*Brown v. Cowden Livestock Co.* (1951, 9 Cir.), 187 F.2d 1015, 1018).

As this court recently said in *Stevenot v. Norberg* (1954, 9 Cir.), 210 F.2d 615:

> "When a finding is essentially one dealing with the effect of certain transactions or events, rather than a finding which resolves disputed facts, an appellate court is not bound by the rule that findings should not be set aside, unless clearly erroneous, but is free to draw its own conclusion." (Id., p. 619)

The conclusion that Olson did not breach his contract is not supported by any evidence and should be set aside by this court.

II.

THERE WAS NO MUTUAL RESCISSION OF THE CONTRACTS BY CAMPOS AND OLSON ON JUNE 19, 1951

Viewing the June 19, 1951 meeting as the defendants will insist we must, and assuming arguendo that all Campos said was simply that Olson could go to the mainland, nevertheless, we submit that under the previous pressure by Olson due to the interference of Flaherty and his representatives, there was little else of any effect that could be said or done. Olson had made up his mind. He had flatly announced that he was leaving Campos; he went to the meeting of June 19, 1951 and told those present the same thing. Such a reply by Campos was entirely consistent with an acceptance on his part of Olson's prior repudiation of the contracts. There was absolutely no consideration for rescission (5 *Corbin on Contracts* 961). As a rescission is in fact a new contract (*Tuso v. Green* (1924), 194 Cal. 574, 582), it requires offer, acceptance and consideration.

In *Tuso v. Green* (op. cit.) plaintiffs' deed and defendant's $300.00 (and later another $700.00) were deposited with instructions in escrow with the bank. The agreement was that in case of default the payments were to be forfeited to the plaintiff seller. The buyer defaulted and by letter to the bank stated it would not be possible to make further payments. Plaintiffs did not respond to this letter but sold the property to a third person and brought the action against the bank for the $1,000.00. With regard to defendant's contention that the contract was mutually abandoned and rescinded the California Supreme Court said:

> "A rescission when effected by mutual consent is a new contract, to effect which there must be a meeting of the minds. It is true that the consent of the parties to such an agreement of rescission is not required to be

expressed in words, but may be manifested by conduct. But such conduct must afford a stronger basis for the inference of consent than mere conjecture or speculation. The letter of January 3d was not expressly or by necessary implication an offer to rescind. By it the appellant made no offer on his part except to pay the bank for the expenses of drawing the papers. Neither expressly nor by implication did he offer to restore the plaintiffs to substantially the same position as if the contract had not been made, nor did it contain any offer, expressed or implied, to do equity, notwithstanding it appeared inferentially therefrom that the defendant had been in possession and enjoyment of the premises for some time. Neither did it contain any proposal which called upon the plaintiffs to either accept or reject the same. It amounted to no more than a notification by defendant that he did not intend to further perform the contract. If by a process of liberal construction it could be deemed an offer of rescission we find nothing in the evidence which required the trial court to conclude that plaintiffs had accepted it as such."

One of the leading authorities on the law of contracts, Professor Corbin, takes the same view:

"It should be observed, however, that a mere expression of repudiation by one party [Olson] to a contract is not an offer of a rescission. *Acquiescence in such a repudiation by the other party* [Campos] *is not an acceptance of an offer of rescission and does not prevent the repudiation from being a breach of contract creating the usual remedial rights.* Thus, suppose that A [Olson], who is under a contract for the construction of a building for B (Campos), should tell B (Campos) that he is not going to perform the contract. B (Campos) replies: 'Very well, I shall at once get another builder.' This conversation is not operative as a rescission of the contract. *B's* (Campos') *duty to A* (Olson)

is indeed discharged by A's (Olson's) *repudiation; but the repudiation is a breach of contract, for which B* (Campos) *can maintain an action for damages.*" (5 *Corbin on Contracts,* Sec. 1236, p. 961, insertions and emphasis ours.)

We furthermore submit that the view of the evidence contended for by defendants is clearly erroneous and is not supported by the facts. At the commission meeting after Olson's repudiation Campos did not simply tell Olson he could go and fight on the mainland (R. 119). Campos also said he would get Olson a trainer—the same as Lipton had arranged with Flaherty in 1946 when Olson first went to the mainland. Campos testified that at the meeting he insisted on retaining his management rights. Stagbar squarely corroborated Campos in this (R. 214-215) and Sterling supports Campos so far as remembering the discussion about Campos offering to get Olson a trainer (R. 277).

As already shown Campos had previously refused substantial offers to sell his rights under these contracts. He continued to assert his rights after Olson left in the same manner as he had when Olson left the first time in September, 1949. Campos did not at any time acquiesce in Olson's unilateral repudiation of the agreements nor can such an inference be properly made from the record in this case. In *Compania Engraw Commercial E. Industrial S.A. v. Schenley Distillers Corporation* (1950, 9 Cir.), 181 F.2nd 876, this Court correctly sets forth the California law:

"A study of California decisions leaves no doubt that one contracting party cannot, by any unilateral act or declaration, destroy the binding force of a contract. These decisions make it clear that the effect of a one party repudiation is to give the promisee an election either to hold fast to the contract or to treat the repudiation as a termination for all purposes of perform-

ance. *Alderson v. Houston,* 154 Cal. 1, 96 P. 884; *Simmons v. Sweeney,* 13 Cal. App. 283, 109 P. 265; *McConnell v. Corona City Water Co.,* 149 Cal. 60, 64, 85 P. 929, 8 L.R.A., N.S., 1171.

"The relevant inquiry to be made, then, is whether Engraw, either explicitly or implicitly at the time, treated Schenley's repudiation as an ending of the contract.

"Nothing at all in the record indicates that Engraw then acquiesced in the repudiation. To the contrary, *Engraw continued to assert a continuing obligation of Schenley to take delivery of the glucose.* For several months discussions continued between the parties concerning means of liquidating the obligation of Schenley.

"The trial court appears to have assumed that, because Schenley, on the day it repudiated, specifically denied the existence of the contract, Engraw must be deemed to have then treated the contract as at an end. But we think that assumption to be unwarranted and indeed unrealistic. For experience teaches that seldom is a defrauding party inarticulate in the assertion of some plausible reason for default. And the most common of these excuses is that there was no contract at all! Our conclusion is that there is no justification in the record to support a holding that Engraw then acquiesced in Schenley's unilateral repudiation." (*Id.* p. 878, emphasis ours.)

The territorial commission's attitude as expressed in Secretary Lee's letter to Campos on July 9, 1951 (Exhibit 20) and in its minutes of July 2, 1951 (Exhibit 33) and October 8, 1951 (Exhibit 23) conclusively demonstrates that the commission regarded the contracts as remaining in full force and effect and more importantly that nothing had been said at the June 19th meeting to cause the commission to view the contracts as having been modified, cancelled or rescinded

in any respect whatever. The evidence is uncontradicted that no action was taken by the commission toward cancellation.

Modification of a written contract by oral agreement must clearly be shown by the evidence.

> "Before courts will set aside solemn binding written contracts and substitute therefor oral agreements, proof of the latter *as to every element thereof, as well as execution, must be clear and convincing.*" *Houghton v. Lawton* (1923), 63 C.A. 218, 223; emphasis ours.

A similar view was taken in *MacKenzie v. Hodgkin* (1899), 126 Cal. 591, 598, which also involved a purported oral modification of a written contract, where the court said:

> "A written instrument would afford but slight protection to the parties in such cases if it could be varied in this manner; a bailment could be converted into a sale, or a sale into a bailment, according as the interests of either party, after delivery of the goods might lead him to the belief, real or feigned, that the delivery had not been pursuant to the original writing, but under a subsequent oral arrangement." (*id.*, pp. 598, 599)

Such a showing has not been, nor could it be made here.

Olson breached the Campos contracts by performing in subsequent boxing contests under the exclusive management of Flaherty and not under the direction of Campos (Exhibit 2, Sec. 5; Exhibit 8, Sec. 7). This alone is enough to constitute the breach under the express terms of the agreements. Olson's repudiation of the contracts—while performing exclusively for Flaherty—excused Campos from any further demand or performance on his part and entitles him to recover in damages.

Thus in *Ross v. Tabor* (1921), 53 Cal. App. 605, the parties had entered into a three year agreement under which plaintiff was to furnish a certain quantity of bees and defendant agreed to care for them and increase the number of colonies. Also plaintiff was to furnish defendant with a house and automobile to be used in the work. A few months after the execution of the contract plaintiff found the house vacant and the automobile standing in the yard without oil or gas. Accordingly, he assumed that defendant had abandoned the contract and thereupon took the automobile home. Thereafter, neither party contacted the other for an explanation and plaintiff took over the care of his bees. He waited until the expiration of the contract period and then sued defendant for damages for failure to increase the number of colonies. Defendant claimed that he had not quit caring for the bees until plaintiff took back the automobile and that therefore plaintiff was first to breach the contract. On appeal from a non-suit against plaintiff the question was whether the evidence established a breach on the part of defendant. In this connection the appellate court held that the facts as they appeared to plaintiff were sufficient to go to the jury on the issue of whether defendant had first abandoned the contract—in other words, that such an abandonment if found by the jury constituted a breach of the contract for which defendant was liable in damages. With respect to the duties of plaintiff in the case of such a breach, the court said:

> "Nor was it incumbent upon appellant to hunt up respondent and offer to return to him the automobile, or ask him to go back to the house that he had supplied for respondent's use. The contract was a continuing executory contract, requiring of respondent continuous service over a three-year period. And if, as might be inferred from his conduct in leaving the house and the

automobile, respondent had abandoned his contract, thereby breaching it, *appellant was under no obligation to demand that respondent continue to perform his contract.* Respondent cannot escape liability because appellant did nothing other than to take steps to prevent a further loss and an increase of damages. The rule is that a party to a contract cannot take advantage of his own omission to observe the requirements of his contract. If he breaches the contract he cannot interpose the breach as a defense to an action on the contract. 'The rule is general that the right to rescind a contract rests wholly with the party who is without default. One cannot violate the contract himself and then seek a rescission on the ground that the other party has followed his example.'" (p. 612, emphasis ours.)

See also *Walker v. Harbor Business Blocks Co.* (1919), 181 Cal. 773 at page 778.

We submit that even under defendants' view of the evidence once Olson left Hawaii and appeared in San Francisco under Flaherty's management he breached his contract with Campos; that Campos without further performance or demand on his part became immediately entitled to sue for damages to recover the prospective value of the contracts as of that time which he elected to do by filing suit against Olson for $50,000.00 damages in the state court in San Francisco on September 11, 1953 (Exhibit 25); and that meanwhile Campos was excused from all further performance under the agreements and was under no duty whatever to attempt to arrange fights for Olson whom he no longer controlled.

One federal court while not directly deciding the point here involved used the term "practical repudiation". Jim Braddock had left Madison Square Garden's auspices and agreed to fight Joe Louis instead of Max Schmeling. "There

was practical repudiation for the reason that a heavyweight boxer, through sheer physical limitations, cannot engage in two major contests involving the title of World's Heavyweight Champion within nineteen days." *Madison Square Garden Corporation v. Braddock* (1937, 3 Cir.), 90 F.2d 924 at page 926. Obviously,then, a "practical repudiation" occurred here when Olson met Hunter, originally procured by Campos, but in San Francisco on July 9th and under the management of Flaherty.

The curt reply of Jack Dempsey, then world's heavyweight champion, to a request by the Chicago Coliseum Club "* * * As you have no contract suggest you stop kidding yourself and me also. JACK DEMPSEY," was held to be a repudiation of a written contract between the Club and Dempsey entitling the Club to damages. This telegram was in response to the request of the Club that Dempsey have a physical examination as required by the agreement in order that his life could be insured in favor of the Club prior to the scheduled Dempsey-Wills fight. Dempsey was at that time training for a fight with Tunney (*Chicago Coliseum Club v. Dempsey* (1932), 265 Ill. App. 542).

Repudiation takes many forms.[7] Olson's words and actions were certainly clear enough. It was his decision whether or not to repudiate his agreement but not at the expense of justice. "Liberty tweaks justice by the nose * * * and quite athwart goes all decorum."

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7. "Such repudiation as will amount to a breach may take various forms showing a positive intention not to perform, other than a statement to that effect * * *. The same is true of denying the validity of the contract between the parties, or insisting that its meaning or legal effect are different in a material particular from the true meaning or effect, coupled with the assertion, expressed or implied in fact, that performance will be made only according to the erroneous interpretation." (5 Williston on Contracts, Rev. Ed., 3726-3727).

We submit that this Court should determine that the findings of the trial court on this phase of the case are clearly erroneous and should be set aside (Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A.). As to the documentary evidence, depositions and exhibits, this Court is in as good position as the trial court to make the appraisal (*Equitable Life Assurance Society v. Irelan* (1941, 9 Cir.), 123 F.2d 462).

The judgment below is also based on findings by the trial court of waiver and abandonment on the part of Campos under the circumstances already indicated.

Abandonment is defined as the *intentional* relinquishment of a known right (*City of Los Angeles v. Abbott* (1933), 129 C.A. 144, 148). An intention to abandon expressed by an external act is included in this definition (op. cit.).

Waiver is defined as an *intentional* abandoning of a known right (*Webster's New International Dictionary,* 2d Ed.).

Campos' statement at the June 19th meeting that Olson could go to the mainland (R. 119) is the apparent basis for the finding on this point. This statement cannot be divorced from its context nor can the circumstances under which it was made be ignored. There is no evidence whatever in this record that Campos intended to waive or abandon his right of action which accrued on Olson's repudiation of the contracts. Furthermore the uncontroverted evidence of subsequent events squarely corroborates the Campos, Stagbar and Sterling testimony that Campos expressly stated that he was retaining his contractual rights. There was no waiver or abandonment.

Thus the facts in *Steelduct Co. v. Henger-Seltzer Co.* (1945), 26 C.2d 634, are strikingly similar to this case.

Plaintiff had, as modified, a five-year exclusive sales agency contract with defendant. In February, 1939 defendant commenced negotiations with a competitor of plaintiff which culminated on April 1, 1939 with an exclusive sales agency contract between the competitor and defendant. In March of that year defendant wrote plaintiff "* * * we are terminating our agreement with the Steelduct Company on conduit and that we are making other arrangements. We would very greatly appreciate your giving us your disposition on the stocks we have immediately". Plaintiff Steelduct Company replied that it expected defendant to maintain the contract. At the end of March there was a meeting between plaintiff's president and Seltzer.

Seltzer testified of that meeting: "I told Mr. Collier, [plaintiff's president] after hearing the statement of Mr. Stultz, [a customer] that I couldn't see any use in our continuing under the circumstances" and Collier replied that "he couldn't see that we were going to get very far either under the circumstances". (id. p. 645, insertions ours.) Defendant contended there was a mutual abandonment. The Supreme Court reversed the judgment on the ground a verdict could not be sustained on the theory of mutual abandonment.

> "Mutual assent to abandon a contract may be manifested by conduct of the parties. (*Treadwell v. Nickel* (1924), 194 Cal. 243, 259 [228 P. 25]; *Tuso v. Green* (1924), 194 Cal. 574, 582 [229 P. 327]; *Lohn v. Fletcher Oil Co., Inc.* (1940), 38 Cal. App. 2d 26, 30 [100 P.2d 505].) And if there was any material and competent evidence from which it can be inferred that plaintiff manifested such assent, it was proper to give the questioned instructions and the verdict must be sustained insofar as that issue is concerned. But it does not appear that the above summarized evidence, under any reasonable view, can give rise to such inference.

"The facts that plaintiff's president urged defendants to perform the contract and sought to retain Stultz's business do not prevent plaintiff from treating defendants' renunciation as a breach or indicate that plaintiff agreed to the condition which defendants sought to impose. (Cf. *Alderson v. Houston* (1908) *supra,* at p. 7 of 154 Cal.) 'Where a party to a contract insists that he is not under legal obligation to perform the contract, and that insistence is coupled with a continuance of his original stand and refusal to perform, the breach is plain, and he cannot successfully take refuge in the plea that he must be excused because the other party urges that the contract be carried out. * * *' (*Tri-Bullion Smelting & Development Co. v. Jacobsen* (1916), 233 F. 646, 649 [147 C.C.A. 454]; see *United Press Ass'n v. National Newspaper Ass'n* (1916), 237 F. 547 [150 C.C.A. 429].)

"The evidence which seems most nearly to admit of an inference that plaintiff consented to abandonment of the contract is that (according to the testimony of Seltzer, which must be accepted as true in every reasonable implication favorable to defendants) Collier, in reply to Seltzer's statement 'that I couldn't see any use in our continuing under the circumstances,' said that 'he couldn't see that we were going to get very far either under the circumstances.' The jury, however, had no right to detach this single statement from its context. *It was made at a time when defendants had announced and reiterated their refusal to perform their contract obligations.* Only by disregarding uncontradicted evidence and indulging in definitely strained construction can it be taken to refer to anything more than the plaintiff's efforts to induce defendants to perform their contract obligations." (Id. pp. 647-648, emphasis ours).

Olson had made up his mind to quit Campos to go to Flaherty and he certainly gave it enough publicity (supra

pp. 6-7). This is the atmosphere of the June 19th meeting of the Territorial Boxing Commission; this is the background of Campos' provisional consent to Olson fighting on the mainland; and it is also the foundation of the trial court's findings of abandonment and waiver. The truth that Campos never at any time waived or abandoned his contract rights must surely emerge from this logomachy.

III.

OLSON'S BREACH OF THE CONTRACTS WAS WRONGFULLY AND UNJUSTIFIABLY INDUCED BY THE DEFENDANT FLAHERTY

Assuming the breach of contract has been established it was unquestionably induced without justification by Flaherty. In September, 1949 he had prevailed upon Olson to sign the contract in San Francisco under which they are still operating although fully aware that Olson was already under contract with Campos (R. 320-321). Nothing came of it at that time because of Olson's suspension for failure to meet Johnny Duke in Honolulu as scheduled except that the contract itself, dated September 26, 1949, was filed by Flaherty with the California State Athletic Commission (Exhibit 9; R. 70). Olson was forced to return to Hawaii to fight Duke by the suspension (R. 103).

Accordingly this is not the case of an unknown fighter importuning Flaherty to take him over at the end of June, 1951 after having been released by his manager. Flaherty knew all about Olson's ability, particularly since his showing against Sugar Ray Robinson in late October, 1950 and he also knew that Campos was his manager. In fact he had entered into the settlement agreement of October 11, 1950 with Campos acting in that capacity (Exhibit 10; R. 70).

It is true that any connection between Leavitt and Flaherty in February, 1951 is based purely on inference

arising from the fact that Leavitt had been involved with Lipton and Flaherty in the management of Olson in 1946 and early 1947 (R. 315, 346). But it is equally true that Leavitt's failure to perform his agreement to produce six main event fights for Olson in early 1951 caused Olson's dissatisfaction with Campos which resulted in the part played by Miles.

Miles was an old and close friend of Flaherty (R. 318). In February, 1951 while Campos and Olson remained hamstrung by their commitment to Leavitt, Olson began talking to Miles about going back to Flaherty (R. 239). Miles advised him (R. 251) and advanced money to him (R. 240) and later, after the June 19th meeting, Miles paid Olson's transportation to San Francisco upon being authorized to advance the same by Flaherty (R. 252, 314).

Olson contacted Flaherty directly in May. Shortly after May 7th he wrote Flaherty saying that he wanted to come to the mainland (R. 241-243, see also R. 319). Flaherty replied that "* * * he had a contract on me (Olson), a California contract, that I had signed, *and that was a good contract.*" (R. 244, insertion and emphasis ours)—in other words, the contract of September 26, 1949 which Flaherty had obtained after notice that Olson was under contract with Campos.

After the June 19th meeting Miles promptly reported to Flaherty telling him that Olson was "about to come up" and as the result of this communication Flaherty arranged with Miles to pay Olson's transportation (R. 319). Olson left immediately and on his arrival in San Francisco "went right up to see Mr. Flaherty" and commenced training in his gym (R. 251-252).

On May 28th Campos had arranged for a bout in Honolulu between Olson and Chuck Hunter which was set for

June 19th (R. 116). This was postponed to July 3d (R. 75) and ultimately cancelled because of the unavailability of Hunter (Exhibits 17, 18; R. 75-76). Six days after the July 3d date, which had been cancelled by the Territorial Boxing Commission because of Hunter's unavailability, namely, on July 9, 1951, *Olson met Hunter in San Francisco under the management of Flaherty* (Exhibit 5, R. 312).

We submit that the foregoing overwhelmingly establishes Flaherty's unjustifiable interference with the contracts between Campos and Olson which entitles Campos to damages. As a matter of fact the mere taking over by Flaherty of the exclusive management of Olson under the terms of the contract of September 26, 1949 (Exhibit 9; R. 70) commencing with the Hunter fight on July 9, 1951, with knowledge of the existence of the prior exclusive agreements between Campos and Olson, is itself enough to constitute the tortious interference.

The doctrine concerning actionable interference with contractual relationships of others emerged in definite form in *Lumley v. Gye* (1853), 2 El. & Bl. 216, 118 Eng. Rep. 749, 1 Eng. Rul. Cas. 707) and is firmly established in American law. This is the rule in California (*Imperial Ice Co. v. Rossier* (1941), 18 C.2d 33; *California Grape Control Board, Ltd. v. California Produce Corporation, Ltd.* (1935), 4 C.A. 2d 242; *Speegle v. Board of Fire Underwriters* (1946), 29 C.2d 34; also see cases collected 26 A.L.R. 2d 1235) and in the federal courts in this district (*Sunbeam Corporation v. Payless Drug Stores* (1953 U.S. Dist. Ct. N.D. Cal. S.D.), 113 F. Supp. 31).

Thus in *Romano v. Wilbur Ellis & Co.* (1947), 82 C.A. 2d 670 the court approved a quotation from 41 Harvard Law Review (page 747) as follows:

> " 'The interest in freedom from interference with contracts cannot be invaded with impunity in furtherance

of an interest in freedom to enter into contract relations, an interest less highly protected in the law than the interest in contracts. Therefore, if the defendant enters into a contract with a person, who is already under contract with the plaintiff, *with knowledge or surmise of the existence of the prior contract,* and of the fact that performance to the defendant will prevent performance to the plaintiff, he is merely furthering his interest to enter into contracts and he should not only not be able to recover on the contract which he has made, but should be held liable for inducing breach of contract, or be enjoined from interference, even though the prior contract does not give the third person a property interest.'" (id. p. 673, emphasis ours.)

The Restatement of Torts, section 766, cited with approval in the *Romano* case defines the cause of action as follows:

"Except as stated in Section 698 [marital situations] one who, without a privilege to do so, induces or otherwise purposely causes a third person not to

(a) perform a contract with another, or

(b) enter into or continue a business relation with another

is liable to the other for the harm caused thereby." (Insertion ours.)

In California the rule has been extended, as it has in most jurisdictions, to render unjustifiable interference with the contract of another actionable even though the *means* used to procure the breach are themselves *lawful.*

Thus in Imperial Ice Company v. Rossier (1941), 18 C.2d 33, *supra,* the Supreme Court of California said:

"It is universally recognized that an action will lie for inducing breach of contract by a resort to means in themselves unlawful such as libel, slander, fraud, physical violence, or threats of such action. (See cases

cited in 24 Cal. L. Rev. 208; 84 A.L.R. 67.) Most jurisdictions also hold that an action will lie for inducing a breach of contract by the use of moral, social, or economic pressures, in themselves lawful, unless there is sufficient justification for such inducement. (citing authority)." (*id.* p. 35)

The right of Campos to the exclusive services of Olson under their contracts was a property right concerning which Campos is entitled to protection (*California Grape Control Board, Ltd. v. California Produce Corporation, Ltd., supra,* (1935), 4 C.A. 2d 242, *Blender v. Superior Court* (1942), 55 C.A. 2d 24); and Flaherty's interference with knowledge of the contracts is an actionable wrong.

Flaherty caused the formation of defendant Sid Flaherty Promotional Enterprises, Inc. on June 7, 1954 (R. 321). This corporation received the compensation from Olson's bouts after that time and Flaherty continued as Olson's manager (R. 324). It thus clearly appears that Flaherty's continuous interference with the Campos-Olson contracts subjects the corporation to liability for its subsequent enjoyment of the fruits of this wrong (Civ. Code of Calif. 3521).

CONCLUSION

We submit that the judgment of the District Court should be reversed. It is also submitted that inasmuch as all the evidence pertaining to Olson's subsequent ring earnings stands uncontradicted in the record, this Honorable Court should direct the trial court to enter judgment for the plaintiff and against all defendants in an amount equal to the manager's share of Olson's earnings commencing with July 9, 1951 less one-third thereof which would customarily be paid to a mainland manager.

Dated: November 12, 1956.

Respectfully submitted,

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